IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DENISE SMOKE,	)	
	)	
Appellant,	)	
	)	
V.	)	C.A. No. N10A-09-002 JRS
	)	
	)	
COVENTRY HEALTH CARE	)	
and The UNEMPLOYMENT	)	
INSURANCE APPEAL BOARD,	)	
	)	
Appellees.	)	

Date Submitted: May 19, 2011
Date Decided: July 13, 2011

Upon Consideration of
Appeal From the Unemployment Insurance Appeal Board.
AFFIRMED.

This 13th day of July, 2011, upon consideration of the *pro se* appeal of Denise Smoke from the decision of the Unemployment Insurance Appeal Board (the "Board") denying her claim for unemployment benefits against her former employer, Coventry Health Care ("Coventry"), it appears to the Court that:

1. From January 20, 2009, until her discharge on January 27, 2010, Smoke was employed by Coventry as an associate technical claims specialist handling

incoming customer telephone calls.[1] At the time Smoke was hired, she received Coventry's Employee Handbook.[2] The employee handbook explicitly prohibited employees from "refusing or failing to perform assigned work" and "[r]udeness to another employee, member, provider, or guest."[3] The handbook also states that, for such behavior, corrective action may be taken, "up to and including immediate termination of employment."[4] Smoke received six to eight weeks of training during which the employee handbook information was discussed.[5]

2. During Smoke's employment with Coventry, Smoke's supervisor conducted "spot listening" on customer phone calls handled by Smoke (five calls per month).[6] On January 26, 2010, Coventry conducted an audit and review of Smoke's call records and discovered a series of inconsistencies.[7] The audit (covering the period of August, 2009 through January, 2010) revealed that Smoke avoided 603 phone calls by either failing to greet incoming calls within the required 30 seconds

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[1]Record ("R" at__) R. at 31.

[2]*Id.* at 5.

[3]*Id.* at 10, 18.

[4]*Id.* at 9.

[5]*Id.* at 95.

[6]*Id.* at 117.

[7]*Id.* at 31.

or allowing callers to hold until they hung up.[8] Coventry regards only five to ten such calls per month as acceptable.[9]

3. Coventry verified the misconduct by listening to multiple recorded calls handled by Smoke and reviewing images (or "screen shots") of her computer monitor at the time of the calls.[10] This verification confirmed Smoke's phone systems were functioning properly and she was receiving the callers' information.[11] For comparison, Coventry also audited the call records of several other employees.[12] Coventry found that other employees missed approximately five calls per month, while Smoke missed over 100 calls per month.[13] When confronted, Smoke was unable to provide an explanation for the phone call discrepancies.[14] Coventry subsequently terminated Smoke, relying on provisions within the employee handbook.[15]

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 106.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 31.

[15] *Id.* at 106.

4. Smoke filed a claim for unemployment benefits with the Department of Labor ("DOL") on January 24, 2010.[16] The Claims Deputy determined that Smoke was terminated for just cause and, therefore, was disqualified from receiving benefits pursuant to 19 *Del. C.* §3314(2).[17] The determination of disqualification for benefits was dated and mailed to Smoke on March 30, 2010.[18]

5. Smoke filed a timely appeal of the denial of benefits and, on April 29, 2010, the Appeals Referee conducted a hearing on the issue of whether Coventry discharged Smoke from her employment with just cause.[19] The Appeals Referee determined that "the very essence of [Smoke's] job was to answer telephone calls."[20] The Appeals Referee also found that Coventry established, by a preponderance of evidence, that Smoke intentionally avoided calls and that such conduct represented a willful or wanton violation of Coventry's expected standard of conduct by its

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[16] *Id.* at 26.

[17] 19 *Del. C.*§3314(2) states: "An individual shall be disqualified for benefits: For the week in which he was discharged from his work for just cause in connection with his work and for each week thereafter until he has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount."

[18] R. at 26.

[19] *Id.* at 32.

[20] *Id.*

employees.[21] Therefore, the Appeals Referee determined that Coventry discharged Smoke for just cause.[22] The decision was mailed to Smoke on May 12, 2010.[23]

6. Smoke filed a timely appeal and, on July 21, 2010, the Board conducted a hearing on the Appeals Referee's determination.[24] The Board affirmed the Appeals Referee's decision, agreeing that Smoke was discharged for just cause and upholding the denial of unemployment benefits for Smoke.[25] A letter of determination was mailed to Smoke on August 27, 2010.[26]

7. Smoke filed a timely appeal to this Court on September 2, 2010.[27] Smoke contends that: (1) she neither willfully nor wantonly avoided phone calls during the period of August, 2009, to January, 2010; and (2) if this Court does find she willfully or wantonly avoided phone calls during said period, then, because of the long time span of the conduct, Coventry must be found to have acquiesced in her behavior.

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 30.

[24] *Id.* at 105.

[25] *Id.* at 107.

[26] *Id.*

[27] *Id.*

8. The Court's review is limited to determining whether the Board's decision was supported by substantial evidence and free from legal error.[28] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[29] The record must be reviewed in the light most favorable to the prevailing party.[30] Alleged errors of law are reviewed *de novo*, but in the absence of legal error, the Board's decisions are reviewed for an abuse of discretion.[31] This Court will find an abuse of discretion only when an administrative board's decision "exceeds the bounds of reason given the circumstances, or where rules of law or practice have been ignored so as to produce injustice."[32]

9. The Court must determine if the Board's decision that Coventry terminated Smoke for just cause is supported by substantial evidence. If so, the Board was justified in determining that Smoke did not qualify for unemployment

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[28]*See, e.g., Holowka v. New Castle County Bd. of Adjustment*, 2003 WL 21001026, *3 (Del. Super. 2003).

[29]*James Julian, Inc. of Delaware v. Testerman*, 740 A.2d 514, 519 (Del. Super. 1999) (citiations omitted).

[30]*See, e.g., Id.; E.T. DuPont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1046-47 (Del. Super. 2004).

[31]*See Merritt v. United Parcel Svc.*, 956 A.2d 1196, 1200 (Del. 2008) (citations omitted).

[32]*Bolden v. Kraft Foods*, 2005 WL 3526324, *3 (Del. Super. 2005).

benefits. If not, then the Board erred in affirming the prior decisions denying Smoke's application for unemployment benefits.

10. Just cause is defined as "a 'willful or wanton act or pattern of conduct in violation of the employer's interest, the employee's duties, or the employee's expected standard of conduct.'"[33] A willful act is one that "implies actual, specific or evil intent," while a wanton act is one that is "heedless, malicious or reckless, but does not require actual intent to cause harm."[34]

11. The Court first reviews whether Coventry established, and made Smoke aware of, their interests and her duties as an employee. The Board appropriately utilized the two-prong test, articulated in *McCoy* and *Pavusa,* to determine if termination for failure to follow a policy constitutes "just cause": (1) whether there was a policy in place, and if so, what conduct was prohibited; and (2) whether the employee was aware of the policy.[35] An employee handbook outlining conduct that constitutes grounds for termination is sufficient to establish company policy.[36] Evidence that an employee received the employee handbook is sufficient to establish

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[33]*Abex Corp. v. Todd,* 235 A.2d 271, 272 (Del. Super. 1967).

[34]*Pavusa v. Tipton Trucking Co., Inc.*, 1993 WL 562196 at *3 (Del. Super. Dec. 1, 1993).

[35]*McCoy v. Occidental Chemical Corp.*, 1996 WL 111126, at *3 (Del. Super. 1996); *Pavusa*, 1993 WL 562196 at *3.

[36]*Moeller v. Wilmington Sav. Fund Soc.*, 723 A.2d 1177, 1179 (Del. 1999).

that the employee was made aware of company policy.[37]

12. Coventry provided substantial evidence that it satisfied both prongs of the test set out in *McCoy*. Coventry had a written policy in place in its Employee Handbook putting its employees on notice of possible "corrective action up to and including immediate termination of employment" for "[r]efusing or failing to perform assigned work]" and "[r]udeness to another employee, member, provider, or guest."[38] Smoke's signature on the Employee Handbook Acknowledgment and her six to eight week training is substantial evidence that Smoke was aware of the policy and possible consequences for its violation.[39]

13. Next, the Court reviews whether Smoke violated such policies by a willful or wanton act or pattern of conduct. In this regard, the Court reviews the record in the light most favorable to the prevailing party.[40]

14. Substantial evidence supports the Board's finding that Smoke avoided calls during the period in question and that termination of Smoke's employment was reasonable. Smoke does not dispute the Board's findings regarding the audit and

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[37] *Id.*

[38] R. at 9-10, 18.

[39] *Id.* at 5.

[40] *See, e.g., James Julian, Inc.,* 740 A.2d at 519*; E.T. DuPont De Nemours & Co.,* 859 A.2d at 1046-47.

review of her call history,[41] that her phone systems were functioning properly,[42] and her lack of an explanation for such failures.[43] She does not dispute, therefore, the factual predicates of the Board's conclusion that she violated company policy by a pattern of misconduct.

15. Next, the Court reviews whether Coventry tolerated similar previous actions. If it appears that Coventry had tolerated previous actions of similar severity without warning, then "[a] single instance of irresponsible failure to heed an employer's instructions does not rise to the level of a wilful or wanton act in violation of the employee's expected standard of conduct."[44] If Coventry tolerated Smoke's behavior, "fundamental fairness require[s] an unambiguous warning to [Smoke] that [she] was expected to comply with the employer's standard."[45]

16. The Court determines that Smoke has failed to show that Coventry tolerated her behavior. Coventry was first made aware of Smoke's behavior on

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[41]R. at 33-88; R. at 11-17,20-21.

[42]R. at 106.

[43]*Id.*

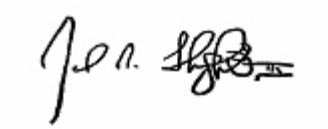
[44]*Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1268 (Del. 1981); *Boughton v. Division of Unemployment Ins. of Dept. of Labor,* 300 A.2d 25, 27 (Del. Super. 1972); *Weaver v. Employment Sec. Commission*, 274 A.2d 446, 447 (Del. Super. 1971).

[45]*Ortiz v. Unemployment Ins. Appeal Bd.*, 317 A.2d 100, 100 (Del. Super. 1974).

January 26, 2010, and took immediate action.[46] Smoke's supervisor performed monthly "spot listening" of Smoke's telephone interactions during the period of August 2009 through January 2010.[47] Coventry confronted Smoke immediately upon discovery of her pattern of misconduct and terminated Smoke the next day.[48] Coventry's actions show no sign of tolerating Smoke's behavior or behavior similar to Smoke's by other employees nor has Smoke provided convincing evidence to the contrary.

17. Based on the foregoing, the Court is satisfied that the Board applied the correct legal standards and that its decision is supported by substantial evidence. Accordingly, the decision of the Board dismissing Smoke's appeal of the Appeals Referee's decision must be **AFFIRMED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

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[46]R. at 31.

[47]*Id.* at 117.

[48]*Id.* at 106.